
CANADA / JUDGMENT

Santoro v. Santoro

2006 BCSC 331

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 331 Santoro v. Santoro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Santoro v. Santoro,

2006 BCSC 331

Date: 20060228

Docket: D010670

Registry: Kamloops

Between:

Marina Jean Santoro

Plaintiff

And

Bruno Santoro

Defendant

Before: The Honourable Mr. Justice Powers

Reasons for Judgment

Counsel for the Plaintiff

M.J. Keim

Counsel for the Defendant

M. S. Harrison

Date and Place of Trial/Hearing:

January 3 - 6, 18, 2006

Kamloops, B.C.

INTRODUCTION

- [1] Ms. Santoro applies to vary an order made December 22, 1994 dismissing her claims for spousal support. The parties were married April 3, 1976 and separated in July of 1994, after approximately eighteen years. The parties had three children who remained in Ms. Santoro's custody. Ms. Santoro commenced the proceeding for divorce in September 1994. The parties retained counsel and entered into a separation agreement December 6, 1994 (the "agreement"). The agreement dealt with the division of the family assets, custody, access, and maintenance for the children. The agreement also provided that neither would claim support from the other, and that Mr. Santoro would pay \$20,000.00 to Ms. Santoro in satisfaction of any claim she may have for spousal maintenance. They agreed to support themselves and make no claim against the other for support, maintenance or alimony. The order of December 22, 1994 was made in the divorce proceedings dismissing Ms. Santoro's claim for spousal support.
- [2] Ms. Santoro filed her notice of motion to vary the order of December 22, 1994, on December 17, 2003, almost nine years later. Mr. Santoro opposes the application. Counsel consented to an order that there be a trial of this issue.
- [3] The notice of motion also deals with some family photographs and some of Ms. Santoro's jewellery. The jewellery consists of her wedding and engagement ring, a diamond pendant and studs, a gold necklace from the North West Territories, and some dinner rings. She estimates their value at \$2,500.00 based on their original cost. The parties had kept them in a safety deposit box prior to separation. Ms. Santoro removed them for a short period of time, returning them to Mr. Santoro's care. He did not return them to the safety deposit box, but kept them at his home. Pursuant to the agreement, he was required to return them to Ms. Santoro. The parties oldest and youngest children, who were having some difficulties, admitted to Ms. Santoro that they found them, stole them and sold them to a pawn shop. Ms. Santoro seeks an order that Mr. Santoro pay her the value of the jewellery; namely, \$2,500.00.
- [4] The issue of the photographs has been resolved by the parties.
- [5] The notice of motion refers to ss. 15.1 and 15.2 and Part 5 of the Divorce Act (Canada) and sections of the Family Relations Act, R.S.B.C. 1996, c. 128 and amendments thereto. However, after some consideration, the parties quite appropriately agreed that the application should correctly be an application under s. 17 of the Divorce Act, an application to vary an order.

THE LAW

[6] The relevant sections of the Divorce Act are:

17.(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

(7) A variation order varying a spousal support order should

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[7] Mr. Santoro argues that there has not been a material change in the parties' circumstances as required under s. 17 of the Divorce Act to justify a variation. He also argues that the parties reached a full and final release and settlement of the issues of spousal support when the agreement was entered into. He argues that he has paid the \$20,000.00, as agreed to under the agreement, and that the parties should be bound by their agreement. Both parties refer to the principles outlined by the Supreme Court of Canada in the decision *Miglin v. Miglin*, [2003] 1 S.C.R. 303. *Miglin* dealt with an application for spousal support pursuant to s. 15.2(1) of the Divorce Act. The spouses had executed a separation agreement settling all matters, including a release of any future claims for spousal support. The application was described as an initial application for support, as opposed to an application to vary an order for support. The court said at ¶91 that the same test would be applied in an application to vary an order pursuant to s. 17 of the Divorce Act, where the order incorporated the terms of a separation agreement.

[8] The court in *Miglin*, after referring to the release of claims for spousal support in the agreement, said at ¶3:

This Court must determine the proper weight to be accorded that agreement where one party subsequently makes an application for spousal support under the Divorce Act.

[9] The court stated at ¶4:

As we explain below, we believe that a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the Divorce Act as a whole should receive considerable weight. In an originating application for spousal support, where the parties have executed a pre-existing agreement, the court should look first to the circumstances of negotiation and execution to determine whether the applicant has established a reason to discount the agreement. The court would inquire whether one party was vulnerable and the other party took advantage of that vulnerability. The court also examines whether the substance of the agreement, at formation, complied substantially with the general objectives of the Act. As we elaborate later, these general objectives include not only an equitable sharing of the consequences of the marriage breakdown under s. 15.2, but also certainty, finality and autonomy. Second, the court should ask whether, viewed from the time the application is made, the applicant has established that the agreement no longer reflects the original intention of the parties and whether the agreement is still in substantial compliance with the objectives of the Act.

[10] The court also said at ¶67:

Therefore, assessment of the appropriate weight to be accorded a pre-existing agreement requires a balancing of the parties' interest in determining their own affairs with an appreciation of the peculiar aspects of separation agreements generally and spousal support in particular.

[11] The court pointed out that the directions of the Divorce Act to the court are to consider an agreement only one factor among others, rather than as binding in dealing with applications for spousal support. (¶77). The court also said at ¶78:

Therefore, in searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act. In doing so, however, the court should treat the parties' reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue. The court should set aside the wishes of the parties as expressed in a pre-existing agreement only where the applicant shows that the agreement fails to be in substantial compliance with the overall objectives of the Act. These include not only those apparent in s. 15.2 but also, as noted above, certainty, finality and autonomy.

[12] The court explains the approach in detail from ¶80-91.

[13] In dealing with the circumstances of execution, the court said at ¶83:

Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere.

[14] However, the court must also go on to consider the substance of the agreement and the extent that it takes into account the factors and objectives of the Divorce Act reflecting inequitable sharing of the economic consequences of the marriage and its breakdown. The court said at ¶84:

Only a significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not substantial compliance with the Act.

[15] Moving to stage 2 of the analysis, the court said at ¶87:

Where negotiation of the agreement is not impugned on the basis set out above and the agreement was in substantial compliance with the general objectives of the Act at its time of creation, the court should defer to the wishes of the parties and afford the agreement great weight. Nevertheless, the vicissitudes of life mean that, in some circumstances, parties may find themselves down the road of their post-divorce life in circumstances not contemplated. Accordingly, on the bringing of an application under s. 15.2, the court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.

[16] The court also said in ¶88:

We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

[17] The court talked about the fact that some degree of change was always foreseeable, such as change in the job market, parenting responsibilities, transition to the work force and that a party's health could not be guaranteed as a constant. The court also recognized that there may be changes in property values, housing prices, or business profitability, but some changes may be caused by the parties themselves. See ¶89:

Where the parties have demonstrated their intention to release one another from all claims to spousal support, changes of this nature are unlikely to be considered sufficient to justify dispensing with that declared intention.

[18] The court said also said at ¶89:

The question, rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.

[19] The court also pointed out in ¶90:

The court's focus should be on the agreement's continued correspondence to the parties' original intentions as to their relative positions and the overall objectives of the Act, not on whether a change occurred per se.

[20] The court made it clear that simply finding change does not justify ignoring the agreement entirely, and also stated at ¶90:

the court should be persuaded that both the intervention and the degree of intervention are warranted.

[21] The court recognized that separation agreements are contracts, and that parties must take responsibility for the contracts they execute as well as for their own lives, and said at ¶91:

It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight.

[22] Ms. Santoro also referred to the British Columbia Court of Appeal decision *B.G.D. v. R.W.D.*, [2003] B.C.C.A. 259. In that case, the parties entered into a separation agreement in 1989 in which the husband agreed to pay spousal support for two years, after which time either party could apply for a continuation or a termination of the support. In 1991, the wife applied for spousal support and the parties reached an agreement that was confirmed and incorporated into a consent order. The agreement and order provided that the husband would pay to the wife a lump sum payment of \$7,500.00, and that thereafter her claims for maintenance would be dismissed. The amount was paid as required by the consent order. Approximately ten years later, the wife applied, pursuant to s. 17(1) of the Divorce Act, to vary the consent order seeking lump sum maintenance or periodic maintenance retroactive to June of 2000. The court said at ¶10:

It is useful to remember that a consent order is really the formal expression of an agreement between the parties and that it must be interpreted and dealt with as if it were a contract. Here, it seems to me, applying those principles, that the intention was that the order would incorporate an agreement for a full and final settlement and release of the wife's claim for maintenance.

¶11 Counsel argued eloquently and forcefully that the parties ought to be allowed to agree to a dismissal of the action to achieve finality without the requirement to submit themselves to further court proceedings, perhaps many years hence, with their attendant expense and anxiety. In my view, that proposition is defeated by the recent decision of the Supreme Court of Canada in *Miglin v. Miglin* 2003 SCC 24 (S.C.C.).

- [23] The Court of Appeal confirmed that the court had the jurisdiction to hear an application for a variation even where the parties had consented to a dismissal, or entered into an agreement for full and final settlement and release.
- [24] Ms. Santoro also referred to a decision *Simpkins v. Simpkins*, [2003] O.J. No. 287, a decision of the Ontario Court of Justice. That decision involved a 23-year marriage. The wife, 51 years of age, was dependent and had little education or work experience. She also had significant mental health problems. The property was shared fairly between the parties. The parties did have independent legal advice, but the court found that the wife in that case had mental health problems and weaknesses that were exploited by the husband. She agreed to accept \$45,000.00 lump sum for spousal support in the circumstances where the husband earned \$100,000.00 per year. At the time of the application the wife was earning \$37,000.00 per year. The court found there was a great discrepancy between the parties' lifestyles. The court also found the settlement was improvident on its face since the circumstances entitled her to spousal support indefinitely, and she bargained it away for \$45,000.00. The court also found that the wife's unfulfilled expectations of self-sufficiency from the settlement were a material change of circumstances. This was a pre-Miglin decision.
- [25] Ms. Santoro also referred to the British Columbia Court of Appeal decision *D.K.N. v. M.J.O.* 2003 BCCA 502. This was an eighteen-year traditional marriage with two children. The wife, with the benefit of independent legal advice, expressly waived spousal support. The parties were in their mid-40s and the children were 12 and 15 years of age. The wife had earned some income from running a daycare centre, but chose to leave Vancouver to enter into a new relationship. She returned to Vancouver approximately a year later, and was unable to re-establish her daycare business. She was required to encroach on her capital to support herself. The husband was earning approximately \$97,000.00 per year by that time.
- [26] The court said in the circumstances of a long traditional marriage and equal division of property that the absence of spousal support would result in the wife suffering the financial consequences of the break down of the marriage, being beyond what the law would anticipate.
- [27] The court referred to the test in *Miglin*. The court found that the circumstances under which the agreement was negotiated, with the assistance of legal counsel, were appropriate. The court found that without some reapportionment of the family assets and some spousal support, it was questionable whether the agreement provided a real prospect for the wife to obtain an acceptable level of long term self-sufficiency. The court found that as the agreement was ultimately construed, it was at odds with the objectives stated in s. 15.2 of the Divorce Act. The court found that in the circumstances it did not substantially comply with the objects of the Divorce Act, and that the trial court acted appropriately in granting the application for spousal support.

- [28] Ms. Santoro also referred to the decision *Ambler v. Ambler*, 2004 BCCA 492. This was a case of a traditional seventeen-year marriage. The wife was 51 and the husband was 50 years of age. The parties entered into a consent order with limited time spousal support. The wife was unable to obtain full-time employment. The court confirmed the Miglin decision would apply on a variation, and the court ordered that the spousal support continue.
- [29] Ms. Santoro also referred to the decision *Tedham v. Tedham* 2005 BCCA 502 as an example of the Court of Appeal considering the objectives of the Divorce Act. This case involved a sixteen-year traditional marriage with two children. The wife was 52 years of age, earning approximately \$25,000.00 per year. The husband was 47, earning in excess of \$300,000.00 per year. The Court of Appeal found that a time limited support order in that case was not appropriate, and that the Divorce Act did not require self-sufficiency, but merely seeks to promote self-sufficiency "in so far as practicable". (¶33). The court considered *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. The court noted that the Supreme Court of Canada had moved away from the earlier authorities that seemed to support a "clean-break" approach to spousal maintenance. The Court of Appeal also recognized that self-sufficiency had to be looked at in terms of the standard of living during the marriage. The court also confirmed that *Moge* promoted "the doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown" based on the wording of the Divorce Act. (¶51).
- [30] Mr. Santoro also referred to *Bracklow*. *Bracklow*, involved a situation where the parties had lived together for four years, then married, and continued to live together for a further three years before separating. They shared expenses in the early part of their relationship, but Ms. Bracklow developed psychiatric problems in 1991, and she was unable to work after that time. Her only source of income was disability benefits. The court considered the objectives of the Divorce Act and pointed out that no single objective was paramount, that the court must look at all of the factors in light of the objectives of support and exercise discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown and strikes the balance that best achieves justice in the particular case. Where self-sufficiency is not possible, a support obligation may arise from the marriage itself. The factors that relate to entitlement may also have an impact on quantum. The court said at ¶53:

The short answer to Mrs. Bracklow's argument is that need is but one of a number of factors that the judge must consider. Similarly, the short answer to Mr. Bracklow's contention is that the length of the marital relationship is only one of a number of factors that may be relevant. While some factors may be more important than others in particular cases, the judge cannot proceed at the outset by fixing on only one variable. The quantum awarded, in the sense of both amount and duration, will vary with the circumstances and the practical and policy considerations affecting particular cases. Limited means of the supporting spouse may dictate a reduction. So may obligations arising from new relationships in so far as they have an impact on means. Factors within the marriage itself may affect the quantum of a non-compensatory support obligation. For example, it may be difficult to make a case for a full obligation and expectation of mutual support

in a very short marriage. (Section 15.2(4)(a) of the Divorce Act requires the court to consider the length of time the parties cohabited.) Finally, subject to judicial discretion, the parties by contract or conduct may enhance, diminish or negate the obligation of mutual support. To repeat, it is not the act of saying "I do", but the marital relationship between the parties that may generate the obligation of non-compensatory support pursuant to the Act. It follows that diverse aspects of that marital relationship may be relevant to the quantum of such support. As stated in Moge, "[a]t the end of the day, courts have an overriding discretion and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives designated in the Act" (p. 866).

- [31] Mr. Santoro also referred to the decision *C.P.H. v. W.G.M.*, 2003 BCSC 1941. This was an application to vary a consent order for spousal support. The parties had been married for fifteen years. They entered into a property division and an agreement which provided that once the husband had purchased the wife's shares in a company for \$400,000.00 that his obligation to pay support would cease, and her claim for spousal maintenance would be dismissed. On her application, the wife failed to establish any suspicion she had about the agreement, or that the dismissal of spousal support was without consideration. She also failed to show that there had been any material change in circumstances or conditions, and the application to vary was dismissed. The court confirmed that Miglin did not eliminate the requirement to demonstrate a change of circumstance on a s. 17 application to vary.
- [32] Mr. Santoro also referred to *Hambuch v. Hambuch*, 2003 BCSC 1001. This involved a fifteen-year marriage with no children. The wife was 57 and the husband 50. By consent, on the divorce, the husband was ordered to pay \$1,800.00 per month spousal support for three years. The wife sought to extend that period based on her health problems. The application was dismissed because her health problems pre-dated the agreement. The court applied Miglin. The court found that the only medical evidence produced by the wife was 1999 medical reports, which demonstrated that there was no change in her circumstances. The application was dismissed.
- [33] Mr. Santoro also referred to *Hamilton v. Hamilton*, 2004 BCSC 582. The court found in this application to vary that the applicant had failed to show any change of circumstance since the order was made, approximately one year before.
- [34] Mr. Santoro referred to *McGregor v. Van Tilborg*, 2005 BCCA 217. This involved a five-year relationship that had ended in 1992. The parties entered into a settlement agreement dealing with division of assets, \$23,000.00 spousal support and \$12,000.00 child support. The application to vary brought on in 1995, which was dealt with by of a summary trial application in June of 2003. The court found that the applicant wife had not shown the settlement agreement itself was unfair. This was a short marriage and her contribution to the assets was minimal. Both parties had the benefit of legal counsel in negotiating the agreement.

BACKGROUND AND PRESENT CIRCUMSTANCES

- [35] The parties were married in 1976, on Mr. Santoro's twenty-fourth birthday. Ms. Santoro was 20 years of age. Mr. Santoro worked in a mine as a machinist and Ms. Santoro worked in a laboratory attached to the mine, and then as a warehouse control clerk for the same mine. The mine was in the North West Territories. The parties moved to Kamloops in 1977. Mr. Santoro found work at a mine near Kamloops as a machinist. Ms. Santoro began to look for work, but the parties' first child was born in 1980, and Ms. Santoro did not work outside the home for many years. She was responsible for caring for the children and the house.
- [36] Mr. Santoro improved his education and became qualified as a millwright and a welder. He continued to work at the mine in Kamloops. Ms. Santoro did some babysitting of a young child in the home for a few months, and did some housecleaning outside the home a few months before they separated. Mr. Santoro left the mine in approximately 1986, and began to work for a company called Moly-Cop Canada, near Kamloops. He was employed as a plant engineer, an engineering technologist and an engineering technician for this company.
- [37] Ms. Santoro experienced periods of depression from the time she was a small child. Most of these periods of depression occurred shortly after the birth of her children. She also developed a problem with alcohol a year or so before she and Mr. Santoro separated. She recognized this problem and attempted to deal with it. Ms. Santoro suffered a back injury and a back fusion when she was approximately 15 to 17 years of age. She had some back problems off and on throughout the marriage, but they were not a significant factor in 1994.
- [38] The parties separated in June of 1994, although they continued to reside in the same home for a number of months after. They each retained counsel, and with the assistance of counsel, negotiated the agreement. The agreement provided for an equal division of their family assets. Ms. Santoro had the primary responsibility for the care of the parties' three children, who were then 14 ½, 13, and 9 years of age. Mr. Santoro agreed to pay child support in the amount of \$600.00 per month per child. Child support was tax deductible to Mr. Santoro and taxable in Ms. Santoro's hands. The agreement provided for full and final settlement of any claims for spousal support. Ms. Santoro received a lump sum payment of \$20,000.00 for spousal support. Her claim for spousal support in the divorce petition she filed was dismissed by the order of December 22, 1994. The agreement was amended January 6, 1998 to deal with some issues regarding pension plans. The amended agreement of 1998 confirmed the existing agreement.
- [39] Ms. Santoro received \$85,000.00 for her interest in the home, which was free and clear, \$20,000.00 for spousal support, for a total of \$105,000.00. She also received her share of the monies from an insurance policy and shares in Columbo Hall for an additional \$31,000.00.

- [40] Ms. Santoro's hope and expectation was that the \$20,000.00 lump sum support and her share of the assets would allow her to acquire a home free and clear of encumbrances. She was able to do that, although it was not of the same value as the matrimonial home. She hoped that with the child support, and what money she could earn by cleaning houses, that she would be able to get by until the children were able to manage on their own. She hoped to be able to advance her education and obtain sufficient work to support herself.
- [41] Mr. Santoro hoped that he and Ms. Santoro would be able to make a clean break by the agreement of a lump sum maintenance, and he would then be able to arrange his affairs without any further concern about any obligation he might have for further spousal support.
- [42] Unfortunately, two of the parties' children, the oldest and the youngest, had difficulties with school and the abuse of drugs. This created a great deal of additional problems for Ms. Santoro that she had not anticipated. She spent more time dealing with problems with the children than either of the parties would have expected. Mr. Santoro did assist on occasion when one or more of the children would come to live with him during particularly difficult times. One of the children gave evidence before me and clearly acknowledged that he was going through a great deal of difficulty with the abuse of drugs. His behaviour included breaking into his father's home and stealing property from his father, including jewellery.
- [43] Ms. Santoro also struggled with the consumption of alcohol. On one or two occasions, she lost a contract for housecleaning because of her problems with alcohol. She has been able to deal with her problem with alcohol by attendance at Alcoholics Anonymous, and has not consumed alcohol for two years or more.
- [44] Ms. Santoro developed a heart problem in 2001. The problem was described as tachycardia or rapid heart rate. She was seen by an internal medicine specialist and prescribed medication, and received surgery in May and September, 2003 to deal with the problem. During the time the problem was symptomatic, it would have significantly interfered with her ability to work, but since her surgery it is not anticipated that she would have any more problems as a result of her heart.
- [45] Ms. Santoro has suffered from depression for most of her life, but that is presently controlled by medication. Her doctor's opinion was that she would not be able to work long hours, shift work, or work in a job that had any degree of stress. Her present depression is considered to be mild to moderate.
- [46] Ms. Santoro's major physical problem that affects her ability to work is her back. She injured her back at the age of 15, and it has given her problems off and on since. In 1979, she received cortisone treatments and the removal of her L4-5 and L5-S1 disc. There was a soft disc rupture at L4-5, and soft and hard disc rupture at L5-S1. In 1983, she received some out-patient physiotherapy from the Royal Inland Hospital to deal with back pain and sciatica. In 1987, she saw a neurologist because of some right foot numbness, but without any specific diagnosis. There appears to have been very little back problems from 1987 through to 2001. Since that time she has had increasing problems with her back, including pain and muscle

spasm. She has been diagnosed with having severe chronic mechanical back pain, likely aggravated by widespread degenerative changes within the spinal axis. Her doctor gave evidence. His opinion was that in 1994 he would not have predicted her condition to be as debilitating as it is at present. He said that it would be normal to expect that there would be some degeneration in her back condition, as there is in anyone else, but he would not have predicted the extent of her disability. In his opinion of April 2, 2004, he expected her to have some degree of pain in the moderate to severe range, which would substantially hamper her ability to undertake a wide variety of employment, especially involving prolonged sitting or lifting, and repetitive bending. She would be unable to be on her feet all day long, or work on adverse terrain. He thought she might be able to undertake some light or part-time work in the future. He expects her condition to get worse. He found that at that time (April 2004) she was unable to work, or even do a lot of her day-to-day light housework. He would not expect her to be able to do anything other than light work. His letter dated August 31, 2005 confirmed that she was incapable of doing any type of employment due to her medical condition of chronic osteoarthritis. She is precluded from any type of physical work and being on her feet for long periods. In his evidence before me he said that there might be some sort of work she could do, such as selling things out of her home or telemarketing, if she was emotionally able to do that.

- [47] In 2003, her doctor assisted her in the completion of an application for Canada Pension Plan disability benefits. The requirements for that pension are that the disability be severe and prolonged. Ms. Santoro received Canada Pension Plan disability payments for one month of 2002, all of 2003 and into 2004, back payments. She continues to receive those payments of approximately \$716.34 per month. She did not receive the initial payment until the lump sum payment of July 30, 2004, covering the period from 2002 to that date in 2004.
- [48] When the children were not residing with Ms. Santoro, or when they moved away from home, she no longer received support for those children. Her ability to pursue work was affected by her physical problems. She took a mortgage on the home in 2000 or 2001, and ultimately sold the home in December of 2003. She used those monies to pay off the mortgage and to purchase a smaller home with those proceeds, \$26,000.00 from her RRSPs and approximately \$5,000.00 from her mother.
- [49] Presently, her only source of income is her Canada Pension Plan disability benefits and some assistance she receives from her mother occasionally. She did attempt to rent some space in her home in the past, but had difficulties with some of the tenants and the fact that the home is really not set up for rental. By this, I mean that the tenants must share the kitchen, and on some occasions, a bathroom. Ms. Santoro found this emotionally difficult, causing her depression and causing her to be concerned about her ability to control her alcoholism under those stressful circumstances.

- [50] Shortly after the parties separated, Ms. Santoro did earn some income from cleaning houses. In 1995, her gross income from that pursuit was \$14,740.00 and a net of \$1,796.00. In 1996, her gross income was \$12,683.00, and a net of \$9,580.00. The records make it difficult to determine what the amount was in 1997 and 1998, but in 1999 she had employment income of about \$11,211.00, in 2000 \$4,825.00. In 2001 and 2002, it was negligible, and in 2003 her employment income was shown at about \$4,290.00.
- [51] Ms. Santoro has filed a property and financial statement claiming expenses of \$1,400.00 per month. Those expenses are modest and, in some cases, inadequate. The amount claimed for food of \$150.00 is certainly less than would be expected for an adult. The limited expenses reflect the limited resources, not a true measure of what would be reasonable for a person in her circumstances.
- [52] I note that Ms. Santoro's property and financial statement indicates that her home is valued at \$88,700.00. She drives a 1999 automobile worth approximately \$6,000.00. She has locked-in RRSPs of \$50,000.00 that reflect the money she received as part of the property division. She is unable to access those funds until she is 55 years of age. She has debts of about \$12,000.00, and makes payments of about \$200.00 per month on those debts.
- [53] Part of those debts relate to student loans. Ms. Santoro did take ten months of training that she hoped would allow her to work with people requiring physical assistance. However, her physical limitations prevent her from pursuing that work.
- [54] Ms. Santoro has tried to start a home business selling coffee and doing crafts, but has had little income from those sources. It was suggested that she could work from her home in telemarketing, but her evidence is that she believes she would find that too emotionally stressful. In light of her difficulties with depression, I accept that this work would be extremely difficult, if not impossible, for her to pursue.
- [55] Ms. Santoro is presently 50 years of age and has limited work experience and education. Her health prevents her from working in any productive way at the present.

MR. SANTORO

- [56] Mr. Santoro is presently 53 years of age. He has worked throughout the marriage as a machinist or a millwright, and I am satisfied he is very skilled in that occupation. He has, throughout the marriage and since, worked in the mining or the manufacturing industry, and for a short period of time had an interest in his own machine shop. Subsequent to the parties' separation and their agreement, he sought additional part-time work in order to help meet his support obligations and the cost of purchasing Ms. Santoro's interest in the family home. He did meet his child support obligations faithfully, and on occasion assisted with the care of some of the children when their behaviour problems made it too difficult for Ms. Santoro to do so.

- [57] He met his child support obligations and assisted the youngest child when that child left home at the approximate age of 17. He also had some of the children live with him from time to time.
- [58] He formed a new relationship in approximately 1996 with his present spouse. His present spouse has two children, a 21 year old son, who is attending university, and a 16 or 17 year old daughter, who is completing high school. Mr. Santoro and his spouse are generous in supporting those two children. They have no hesitation in paying the majority of the son's financial costs of attending university, which are approximately \$14,000.00 per year. Mr. Santoro has no objection to his present spouse ceasing work because the difficulty she was having with her daughter was stressful. He is content to assume all of the family financial obligations for as long as is necessary.
- [59] Mr. Santoro now works in the North West Territories for a mining company. He works fourteen days on and fourteen days off. He receives a northern allowance subsidy to assist him in travelling to and from his place of employment.
- [60] Counsel have agreed that after considering the costs of travel and his northern allowance, it is reasonable to treat his income at approximately \$100,000.00 per annum.
- [61] He continues to own the former matrimonial home and rents that home out. He completed a suite above the garage of that home which he keeps available for his own convenience, and for that of his children when they visit. He and his present spouse also bought a condominium as an investment. That condominium is rented, and when rented, meets all of its own expenses. He has taken a mortgage out on the matrimonial home in order to invest in some other form of investments. Those have not provided him with income, but have provided him with tax write-offs.
- [62] His present spouse owns her own home and Mr. Santoro lives in that home with her. She took a mortgage out on that home in order to pay down two lines of credit which they had, and for the purposes of obtaining funds for other investments. Mr. Santoro paid one-half of the mortgage cost while his spouse was working, and now pays all of those mortgage costs. Only a portion of the mortgage relates to liabilities which were joint between them. Mr. Santoro says that he owes his present spouse approximately \$22,000.00 for monies borrowed over time, but says he is not getting any credit against that debt for meeting all of the expenses at this time.
- [63] That approach is generous towards his present spouse but is not reasonable.
- [64] He has a potential tax liability to Revenue Canada in the amount of approximately \$20,000.00. This is as a result of a reassessment of taxes based on some of the investments which he made. His property and financial statement sworn September 15, 2005, claims annual expenses in excess of \$155,000.00. In that statement, his expenses only include a portion of the mortgage expenses relating to the home occupied by himself and his present spouse. He has included strata fees on the rental condominium of \$100.00 per month, and

house repairs and maintenance of \$350.00 per month. These are overly generous, and the strata fees should be covered by the revenue of the condominium. The expenses relating to utilities for the suite above the garage at the former matrimonial home are more of a luxury than necessity. His transportation costs for travel to and from work are shown at \$1,200.00 per month, but those are off-set by the northern allowance that he receives. I would also note that some of the other transportation costs are as a result of his travel expenses to and from work as well.

- [65] The allowance for vacation at \$350.00 per month is generous, and probably something that he cannot afford whether or not he is obliged to pay spousal support for Ms. Santoro.
- [66] The child care expenses total \$1,045.00. He says that is only one-half of those expenses. The amount seems high to me, and again, overly generous and places his obligations to his present spouse's children ahead of any obligation he might have to his former spouse, Ms. Santoro.
- [67] The amount for RRSP of \$700.00 per month again is something that is probably unrealistic in his financial circumstances. He does have a pension through his employment.
- [68] The amounts for lines of credit loans and Visa are a duplication of the other expenses. This amount is \$1,985.00. The line of credit is really used as a means of managing their monthly expenses. He pays the expenses by the use of the line of credit and then makes payments on the line of credit.
- [69] Mr. Santoro, through hard work and careful arrangement of his finances, has improved his circumstances substantially. He is:

The sole owner of the former matrimonial home with an estimated value of:

\$295,600.00

Owns a half-interest in the rental condominium with an estimated value of:

\$44,700.00

A bank balance of:

\$22,788.00

Pensions and RRSPs:

\$272,811.00

- [70] The mortgage on the former matrimonial home is less than \$123,000.00, and the mortgage on the condominium is approximately \$56,000.00. He has some debts on some charge cards and lines of credit with potential liability to Revenue Canada.
- [71] Despite the fact that his claimed expenses exceed his income by a significant amount, he has been able to take reasonable holidays with his present spouse and her children.

[72] I am satisfied that he is doing much better financially than his property and financial statement would indicate.

ANALYSIS

The first question is whether there has been a material change of circumstance as required under s. 17 of the Divorce Act. (See: *Willick v. Willick*, [1994] 3 S.C.R. 670). A material change in circumstances is a change that if known at the time would likely have resulted in a different order. I am satisfied that in this case there has been a material change of circumstance. When the original consent order was made, Ms. Santoro was able to work, cleaning houses and earning a small income. She had suffered from depression, but it was not debilitating at the time. She had back problems off and on from the time she was a teenager, but they were not debilitating at that time. Her doctor's evidence was that he would not have anticipated her back problems to become as severe or as debilitating as they presently are in this period of time. When the original order was made, Ms. Santoro had the ability to work and expected to be able to upgrade her education and ultimately become self-sufficient. This significant change in her health was not something that could reasonably be anticipated by either of the parties.

[73] I must now consider the test laid out in *Miglin*, and how it applies to the circumstances of this case given the agreement and the consent order. The first stage of the *Miglin* approach is to consider the circumstances under which a settlement agreement was negotiated and executed to determine whether there is any reason to discount it. In this case, both parties were represented by competent legal counsel. Ms. Santoro had suffered depression and was dealing with an alcohol problem. However, there is no indication that Mr. Santoro took advantage of her circumstances in any way. I am satisfied that there is no reason to discount the agreement based on the circumstances of its execution.

[74] The next question is whether the agreement, at the time it was entered into, substantially complied with the general objectives of the Divorce Act, which include an equitable sharing of the financial consequences of the breakdown of the marriage under s. 15.2 as well as certainty, finality and autonomy. The property division was simply an equal division as dictated by the Family Relations Act. There was no particular benefit to either party. The child support was generous but was tax deductible to Mr. Santoro, and there is no evidence to suggest that it was overly generous in return for a limitation of Ms. Santoro's claim for spousal support. Ms. Santoro hoped that with the benefit of the child support and the ability to acquire a home without any encumbrances, she would be able to support herself and ultimately retrain and become self-sufficient.

[75] The quantum of support, a \$20,000.00 lump sum, was not generous given the length of the marriage and the role each party played in the marriage. Even if Ms. Santoro was able to become self-sufficient, as she hoped, it would still leave her to bear a significant portion of the economic consequences of the break-up of the marriage. However, it was an agreement that the parties reached. Ms. Santoro was only 39 years of age at the time and optimistic about her future. Off-setting that, however, was the limited work experience she had

throughout the marriage and the fact that she was responsible for the day-to-day care of the children, even though she was receiving spousal support. The agreement may have met the objectives of the Divorce Act, but only marginally so.

- [76] The second stage is to determine whether the operation of the agreement continues to reflect the intention of the parties and remains in substantial compliance with the Divorce Act. The operation of the agreement as it presently stands does not reflect the intention of the parties. Their intentions and their expectations were that Ms. Santoro would be able to improve her education and become self-supporting. It was not reasonably anticipated that her health would prevent her from working. In the present circumstances, the agreement and order do not recognize the economic advantages or disadvantages arising from the marriage or its breakdown. It places all of those disadvantages upon Ms. Santoro. Given the length of the marriage, the role the parties played in the marriage, and the dramatic change in her physical condition due to her back problems, Ms. Santoro presently bears all of the economic disadvantages of the breakdown of the marriage. I also note that for a period of in excess of a year, her heart problems interfered with her ability to train or obtain employment. I also note that the difficulties she had with the children greatly interfered with her ability to deal with the depression, her alcoholism and further her education and employability. Mr. Santoro is sympathetic towards his present spouse because of the stress she finds herself under with the disagreement she is having with her daughter. The difficulties that Ms. Santoro had with two of their three children were far greater than anything that I have heard about Mr. Santoro's present spouse's difficulties.
- [77] The present order and agreement does not relieve Ms. Santoro of the economic hardships arising from the breakdown of the marriage. In the circumstances of this particular case, it is simply impractical for Ms. Santoro to obtain economic self-sufficiency.
- [78] I am satisfied that I should exercise my discretion in varying the present order. However, that does not mean that the agreement carries no weight or is to be ignored in its entirety. Mr. Santoro referred to the spousal support Guidelines, which would suggest a range of spousal support of \$2,057.00 - \$2,742.00 per month for a duration of nine to eighteen years from the date of separation. The spousal support Guidelines may be useful in many cases, but are of limited use in this particular case. To simply apply them would be to ignore the changes Mr. Santoro has made in his life in reliance on the agreement, and to give no weight to the agreement at all.
- [79] Ms. Santoro argued that her reasonable expenses were at least \$1,900.00 to \$2,000.00 per month. She used the SupportMate Maintenance Planner 2005 to demonstrate that a spousal support order of \$1,500.00 per month, plus her Canada Pension Plan pension, would result in net disposable income to her of \$1,981.00. This would also leave Mr. Santoro with net disposable income of \$4,816.00 per month.

- [80] Mr. Santoro argues that he has no present ability to pay support in any amount. That position places all of his other obligations ahead of any obligation he has to Ms. Santoro. I accept that he is working hard and being careful with his money. I also accept that he also pursues work outside his normal employment in order to help him meet his obligations. However, I would also note that his income has increased since the separation as well as his net asset position. He no longer has an obligation to pay the child support for his three children. He does have an obligation to assist with his present spouse's children having stood in the place of a father to them for approximately ten years. However, the oldest child also has an obligation to take steps to help support his own education, including obtaining work when available to him, taking student loans and being careful about his expenses. It is also unreasonable for Mr. Santoro to simply accept full responsibility for all of his present spouse's financial obligations and saying that he simply has no money to assist Ms. Santoro to whom he was married for eighteen years, and who was primarily responsible for the day-to-day care of their three children after separation for most of the time.
- [81] I find that the appropriate amount of support in the circumstances of this case, including the new obligations that Mr. Santoro has assumed and the agreement itself, is \$1,200.00 per month. This will leave Mr. Santoro with after-tax income of approximately \$5,000.00, and Ms. Santoro with after-tax income of approximately \$1,750.00. There will still be a dramatic difference in their standard of living, but I am satisfied it is appropriate in this case.
- [82] This order should be reviewed after two years. Ms. Santoro is expecting to have back surgery in March of 2006, and this may improve her ability to earn income. The order will certainly be subject to an application to vary if there is a change in Mr. Santoro's employment, such as his retirement. I make that comment to make it clear that would be a change of circumstance which was not reasonably foreseeable at the time this order is made. I expect that he will retire at some time, but I simply wish to make it clear that that would be a change of circumstance.
- [83] The spousal support will commence as of April 1, 2004. The application for a variation was made in the middle of December 2003, but given the particular circumstances of this case, I am satisfied that a reasonable amount of time should have been given to Mr. Santoro to investigate and consider the application. It must be kept in mind that this application was brought nine years after the agreement and consent order in which Mr. Santoro believed the issue of spousal support had been dealt with once and for all. The parties may also address the issue of how the payment should be made, once a month or in two equal payments per month or otherwise.
- [84] If the parties are unable to agree how the payments which have accumulated since then are to be paid, they can address that when they address the issue of costs. I suspect that Mr. Santoro's ability to make a payment on those arrears will be fairly limited.

JEWELLERY

[85] Mr. Santoro had possession of the jewellery that he was required to deliver to Ms. Santoro pursuant to the agreement. While it was in his care, it was stolen by one or two of the parties' children. Mr. Santoro was obliged to deliver the jewellery to Ms. Santoro and simply failed to do so. Ms. Santoro did not ask him for delivery of the jewellery for some time and simply assumed it would have been kept in the safety deposit box where the parties generally stored it. It is not necessary for me to decide whether Mr. Santoro was responsible for the loss of the jewellery because he failed to put it in the safety deposit box. He was responsible to deliver it to Ms. Santoro because that is what he agreed to do in the agreement, and failing to do so he must compensate her for its value. Ms. Santoro estimated its value at \$2,500.00 based on its original cost, and there has been no evidence to contradict that. Therefore, I order Mr. Santoro pay to Ms. Santoro \$2,500.00 in compensation for the loss of the jewellery.

COSTS

[86] Both counsel asked to address the issue of costs after the decision was rendered and they are at liberty to do so.

"R.E. Powers, J."

The Honourable Mr. Justice R.E. Powers

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